

Application No. 09/605,001
Amendment dated November 29, 2005
Reply to Office Action of June 14, 2005

REMARKS

Applicant amended claims 105, 122, 125, and 128 to further define Applicant's claimed invention.

In the Office Action, the Examiner allowed claims 105-120.

The Examiner objected to claims 105, 122, and 125 as lacking antecedent basis for the method step of "performing the surgical spinal procedure." Applicant amended claims 105, 122, and 125 to delete the term "spinal." Applicant submits that the objection to claims 105, 122, and 125 has been overcome.

The Examiner rejected claims 125-127 and 129 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. In particular, the Examiner contends that the retractor arms being "stationary" is not supported by the specification as originally filed. Applicant respectfully traverses the Examiner's contention. On page 42 of the specification, Applicant discloses that "Outer Sleeve 140 is of a fixed length and rigid." (Specification, page 42, line 16). Applicant further discloses that the extended outer sleeve may have extended portions 720, 722, "which are essentially a continuation of the hollow tubular member 702 itself (with or without reinforcement)." (Specification, page 61, lines 18-22; Fig. 26). Applicant submits that retractor arms which may be "reinforced" and are "essentially a continuation" of a hollow tubular member that "is of a fixed length and rigid" are "stationary."

Moreover, the figures can provide support for the claimed invention to satisfy the written description requirement of 35 U.S.C. § 112, first paragraph. MPEP § 2163(II)(A)(3)(a) states that "[a]n Appellant may show possession of an invention by disclosure of drawings or structural chemical formulas that are sufficiently detailed to show that Appellant was in possession of the claimed invention as a whole. See, e.g., *Vas-Cath*, [citation omitted], ("drawings alone may provide a 'written description' of an invention as required by sec. 112"); *In re Wolfensperger*, [citation omitted], (the drawings of Appellant's specification provided sufficient written descriptive support for the claim limitation at issue); *Autogiro Co. of America v. United States*, [citation omitted], ("In those instances where a visual representation can flesh out words, drawings may be used in the same manner with the same limitations as the specification.") (MPEP §

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2163(II)(A)(3)(a), page 2100-170, col. 2 to page 2100-171, col. 1 (May 2004)).

Applicant submits that the retractor arms being stationary is supported at least by Fig. 26. Applicant respectfully submits that the Examiner's rejection of claims 125-127 and 129 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement has been overcome.

The Examiner rejected claims 121-129 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,878,915 to Brantigan ("Brantigan"). Applicant respectfully traverses the Examiner's rejection. Independent claim 121 recites first and second retractor arms, "each retractor arm defining a first vertebra supporting surface to contact a first vertebra and a second vertebra supporting surface to contact a second vertebra." Brantigan teaches a drill guard 22 having teeth or prongs 23 that each penetrate a vertebra. (See Brantigan, col. 5, lines 41-45; Fig. 4). The teeth 23 of the Brantigan drill guard do not have first and second supporting surfaces adapted to contact first and second vertebrae.

Independent claim 122 recites a method including the step of "distracting the adjacent vertebrae by at least partially inserting the distal end portion of the sleeve member within the intervertebral space." Independent claim 125 recites a method including the step of "distracting the adjacent vertebrae to a predetermined distracted position by at least partially inserting the retractor arms within the intervertebral space." Brantigan teaches anchoring drill guard 22 with teeth 23. (Brantigan, col. 5, lines 41-45; Fig. 4). Brantigan does not teach or suggest distracting the adjacent vertebrae as recited in independent claims 122 and 125.

Independent claim 127 recites a surgical retractor having first and second retractor arms "having opposed distracting surfaces, the distracting surfaces of each retractor arm laterally spaced with respect to the longitudinal axis at a predetermined distraction distance sufficient to distract the opposed tissue portions upon insertion thereof." The teeth 23 taught by Brantigan do not have distracting surfaces sufficient to distract opposed tissue portions. (See Brantigan, Fig. 4). The purpose of teeth 23 are to anchor drill guard 22 rather than distract opposed tissue portions. (See, e.g., Brantigan, col. 5, lines 41-45).

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Applicant respectfully submits that the Examiner's rejection of claims 121-129 under 35 U.S.C. § 102(b) as being anticipated by Brantigan has been overcome.

Applicant submits that independent claims 121, 122, 125, and 127 are patentable and that dependent claims 123, 124, 126, 128, and 129 dependent from one of independent claims 121, 122, 125, and 127, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

In view of the foregoing remarks, it is respectfully submitted that the claims, as amended, are patentable. Therefore, it is requested that the Examiner reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-1068.

Respectfully submitted,

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